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November 18, 2011

Mr. Walter L. Thomas Jr.  
Secretary  
Alabama Public Service Commission  
RSA Union Building  
8th Floor  
100 N. Union Street  
Montgomery, Alabama 36104

Re: BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Alabama v.  
LifeConnex f/k/a Swiftel, LLC - **Docket No. 31317**

BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Alabama v. Tennessee  
Telephone Service, LLC d/b/a Freedom Communications USA, LLC - **Docket No. 31318**

BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Alabama v. Affordable  
Phone Services Inc. d/b/a High Tech Communications - **Docket No. 31319**

BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Alabama v. Image  
Access, Inc. d/b/a New Phone - **Docket No. 31320**

BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Alabama v. BLC  
Management, LLC d/b/a Angles Communications Solutions - **Docket No. 31322**

BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Alabama v. dPi  
Teleconnect, LLC - **Docket No. 31323**

Dear Mr. Thomas:

BellSouth Telecommunications, LLC ("AT&T") filed a recent order from the North Carolina Utilities Commission with a letter claiming that the order will inform of issues to be determined by this Commission. That order should not guide the Commission's determinations here, for several reasons. Moreover, if the Commission is to consider decisions from other commissions, it will want to consider any states that have not adopted AT&T's position. For example, the Public Service Commission of South Carolina issued a Commission Directive November 9, 2011 rejecting AT&T's proposed methodology for calculating the cash back promotional credits due CLEC resellers when the value of the rebate is greater than the first month's charges (which is the case with respect to each of the cash back promotions at issue in this case). A copy of the South Carolina Commission Directive is attached hereto as **Attachment "A."**

The South Carolina Commission determined with respect to the calculation of the cash back promotional credits due resellers as follows:

I. Cash Back Offers.... However, since the retail customer gets his rebate after keeping the service for thirty days, this Commission finds that thirty days should be the basis for calculating the rebate. If the rebate is less than the first month's charges the discount should apply to the rebate, since this has the effect of keeping that month's charges to the CLEC within the 85.2% ratio of CLEC charges to the retail rates. *In the case where the rebate is greater than the first month's charges, discounting the rebate means that the BellSouth retail customer in effect gets a better price than the CLEC. This is definitely not what we believe the Telecommunications Act of 1996 intended. Therefore, in the special cases where the rebate exceeds the first month's cost of service, we find that the retail discount should not be applied to [the] rebate.*

In addition, the Louisiana Public Service Commission ("LPSC") recently remanded to the Administrative Law Judge a proposed decision adopting AT&T's positions. A copy of the LPSC Remand Order is attached hereto as Attachment "B."

Therefore, should this Commission look for guidance from other state commissions on the issues pending in the above-referenced docket, the North Carolina order should not be followed. For the reasons explained herein, the North Carolina order is irretrievably flawed by its violation of federal law and the parties' respective agreements, and should be overturned on appeal. Furthermore, the North Carolina order bases its decision not the undisputed *actual* facts, but on *hypothetical* facts which make the North Carolina order unsustainable as precedent and subject to reversal on appeal.

The FCC made clear that when calculating wholesale rates, the wholesale rate would be set "below retail rate levels."<sup>1</sup> The North Carolina Utilities Commission's order strays from federal law because it does not require AT&T to sell its services subject to promotions at a wholesale rate below the retail rate.<sup>2</sup> The North Carolina Utilities Commission's order also allows AT&T to use promotions to avoid its wholesale obligation in violation of paragraphs 948 and 950 of the Federal Communications Commission's ("FCC") *Local Competition Order*.

Furthermore, the North Carolina Utilities Commission's order disregards the parties' interconnection agreements ("ICAs"), which make clear that AT&T must make its promotions available to resellers on terms that are no less favorable than those received by AT&T's retail customers. In fact, the ICAs at

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<sup>1</sup> See *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, FCC 96-325, 11 FCC Rcd 15499, ¶ 910 (rel. Aug. 8, 1996) ("*Local Competition Order*") (emphasis added).

<sup>2</sup> See, e.g., 47 C.F.R. § 51.607. "The wholesale rate that an incumbent LEC may charge for a telecommunications service provided for resale to other telecommunications carriers shall equal the rate for the telecommunications service, *less avoided retail costs*, as described in section 51.609." [Emphasis added.]

promotion must be realized within the time period of the promotion. . . ."<sup>6</sup>;

- "In addition, an incumbent LEC **may not use promotional offerings to evade the wholesale obligation**, for example by consecutively offering a series of 90 day promotions."<sup>7</sup>;
- Consequently, the FCC found that:

...no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs. **A contrary result would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act.**<sup>8</sup>

The FCC's concern that ILECs would attempt to use promotions to avoid the wholesale obligation to resell services at a rate below "below retail rate levels" has been borne out again and again. For example, for years AT&T sought to avoid extending gift card and cash back promotions altogether, but was made to do so against its will. See e.g., *BellSouth Telecommunications, Inc. v. Sanford*, 494 F.3d 439, 442 (4th Cir. 2007); *In the Matter of dPi Teleconnect, LLC, v. BellSouth Telecommunications, Inc.*, North Carolina Utilities Commission Docket No. P-55, Sub 1744. As another example, in the second half of 2009, AT&T attempted to implement a scheme in which it proposed to credit resellers eligible for cash back promotions not the fixed \$50 cash back that the eligible retail customer received, but an amount drastically reduced by bizarre "retention" and "redemption" "factors." The net effect had AT&T providing its retail customers a cash back credit in the amount of \$50, but extending resellers a promotion credit of only \$4.20 in Alabama; \$5.54 in Texas; \$3.73 in Georgia; \$3.65 in Tennessee; \$5.92 in Kentucky; \$3.74 in Louisiana; \$4.66 in South Carolina, and so on across all the states. This Retail Promotion Methodology Adjustment model (as it was called by AT&T) was announced in various AT&T Accessible Letters and was to go into effect in September 2009, but was enjoined by the U.S. District Court for the Northern District of Texas. See *Budget Prepay, Inc. et al., v. AT&T Inc., f/k/a SBC Communications, Inc. et al.*, Cause No. No. 3:09-CV-1494-P in the U.S. District Court, Northern District of Texas, Dallas Division. Although the Fifth Circuit eventually vacated the injunction, See *Budget Prepay, Inc. v. AT&T Corp.*, 605 F.3d 273, 281 (5th Cir. 2010), it did so solely as a matter of primary jurisdiction, and without review of the facts about AT&T's conduct the district judge had found so compelling.

AT&T's latest scheme is no less unlawful. Because AT&T's method for calculating the wholesale promotional price results in a wholesale price above, rather than below, the retail customer's price, it is less favorable to resellers. As a consequence, AT&T's method violates not just federal law, but also the parties' ICAs, and must be repaired or replaced.

<sup>6</sup> *Id.* at para. 950 (emphasis added)

<sup>7</sup> *Id.* (emphasis added).

<sup>8</sup> *Local Competition Order* ¶ 948.

issue before the North Carolina Utilities Commission (which also apply in Alabama) show that AT&T must make promotions lasting 90 days or less available for resale at the promotional rate, but must make promotions lasting longer than 90 days available **at the promotional rate further discounted by the avoided cost**. Thus, for the long term promotions at issue in this case, the resale rate must be **below** the promotional rate.

The North Carolina Commission attempted to justify its position by reasoning that over time, the cumulative amount paid by a reseller will drop below the cumulative amount paid by the retail customer. This contravenes the undisputed fact that the promotions are paid in a single lump sum, not over time, and that the customer need not maintain service for longer than 30 days to be entitled to the cash back promotion. (See, South Carolina PSC Directive – “[S]ince the retail customer gets his rebate after keeping the service for thirty days, this Commission finds that thirty days should be the basis for calculating the rebate.”) It also contravenes paragraph 950 of the *Local Competition Order*, which holds that “[t]o preclude the potential for abuse of promotional discounts, any benefit of the promotion must be realized within the time period of the promotion....”)

Despite the fact that federal law clearly expects that wholesale prices will be set **below** retail rates, and expects that this obligation will be honored even when promotions are in play, the North Carolina Utilities Commission’s order adopts AT&T’s approach which results in the wholesale rate being **ABOVE** the retail rate. (See, South Carolina PSC Directive – “In the case where the rebate is greater than the first month’s charges, discounting the rebate means that the BellSouth retail customer in effect gets a better price than the CLEC. This is definitely not what we believe the Telecommunications Act of 1996 intended.”)

The FCC spent considerable effort explaining the importance of competition by resale and laying out how wholesale rates should be calculated in its *Local Competition Order*. The FCC made clear that when using percentages to calculate wholesale rates, the wholesale rate would be set by a “percent **below** retail rate levels.”<sup>3</sup> The FCC also repeatedly expressed its concern that promotions would be used by ILECs to avoid their resale obligations – namely, the ILECs’ obligation to wholesale their services at a rate “below retail rate levels.” In fact, in the space of four paragraphs on promotions, the FCC articulates this concern *no less than five times*:

- “We are concerned that conditions that attach to promotions and discounts could be used to avoid the resale obligation to the detriment of competition”<sup>4</sup>;
- “We are concerned that excluding promotions [from the wholesale obligation] may unreasonably hamper the efforts of new competitors that seek to enter local markets through resale.”<sup>5</sup>;
- “To preclude the potential for abuse of promotional discounts, any benefit of the

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<sup>3</sup> *Local Competition Order* para. 910, (emphasis added).

<sup>4</sup> *Id.* at para. 952.

<sup>5</sup> *Id.* at para. 950



The North Carolina Utilities Commission suggests that *BellSouth Telecommunications, Inc. v. Sanford*<sup>9</sup> approves AT&T's proposed method of reducing the value of the cash back promotion by the Commission's wholesale discount percentage. This is incorrect.

In fact, the principle that wholesale rates should always be *below* retail rates is key to the Fourth Circuit Court of Appeals' decision in *Sanford*, the leading appellate case on promotions. In *Sanford*, the Fourth Circuit held that promotional offers extending for more than 90 days created a "promotional retail rate" to which the avoided cost (wholesale discount) must be applied.<sup>10</sup> The Fourth Circuit held that for long-term promotional offerings (such as the ones at bar), the avoided cost or wholesale discount must be subtracted from the *effective* retail rate that results from applying the value of the promotional offering to the retail rate of the underlying service.<sup>11</sup>

The key lesson from *Sanford* is that wholesale must be less than retail. However, in cases like those at bar, where the promotion amount exceeds the retail price of the service (e.g., a \$25 service combined with a \$50 cash back promotion), AT&T's methodology creates a higher price to resellers (through a smaller bill credit) than the price paid by AT&T's retail customers, which is *exactly* the outcome that *Sanford* and the South Carolina PSC found unreasonable.<sup>12</sup> In effect, the AT&T formula turns *Sanford* on its head by trying to use the court's reasoning to achieve the very result – a wholesale rate above retail – that offended the *Sanford* court and caused it to reject AT&T's policy of refusing to provide the value of cash back promotions to resellers altogether.

The North Carolina Utilities Commission erred by disregarding the facts. Notwithstanding the clear directive of the law and the ICAs, AT&T admittedly does not charge resellers a price *below* the retail promotional price; it charges resellers *MORE* than the retail promotional price. Therefore, AT&T's method for calculating cash back promotion credits approved by the North Carolina Utilities Commission conflicts with federal and state law and regulations because it violates the key principle that wholesale should be less than retail.

Very truly yours,



Robin G. Laurie

RGL:dpe

<sup>9</sup> *BellSouth Telecommunications, Inc. v. Sanford*, 494 F.3d 439 (4<sup>th</sup> Cir. 2007).

<sup>10</sup> This "promotional retail rate" is referred to herein as the "effective retail rate."

<sup>11</sup> *Sanford* at 442.

<sup>12</sup> As explained by the *Sanford* court, "Because its position would not account for the promotional rebate check, BellSouth's position would obviously impede competition. The competitive LEC would have to pay BellSouth a wholesale rate of \$96 for the telephone service for which BellSouth's retail customers would pay only \$20." *BellSouth Telecommunications, Inc. v. Sanford*, 494 F.3d 439, 451 (4<sup>th</sup> Cir. 2007). Although AT&T's method as applied in the case at bar results in a slight less stark example of the wholesale rate being higher than the retail rate, it violates the same core principal from *Sanford* that the wholesale rate *must be* less than the retail rate or competition would be harmed.

Mr. Walter L. Thomas Jr.  
November 18, 2011  
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Enclosures

cc: Counsel of Record

# **ATTACHMENT A**

**PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA  
COMMISSION DIRECTIVE**

ADMINISTRATIVE MATTER	<input type="checkbox"/>	DATE	<u>November 09, 2011</u>
			<u>2010-14-C/2010-15-C</u>
MOTOR CARRIER MATTER	<input type="checkbox"/>	DOCKET NO.	<u>2010-16-C/2010-17-C</u>
UTILITIES MATTER	<input checked="" type="checkbox"/>	ORDER NO.	<u>2010-18-C/2010-19-C</u>

**SUBJECT:**

DOCKET NO. 2010-14-C - Complaint and Petition for Relief of BellSouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Affordable Phones Services, Incorporated d/b/a High Tech Communications;

DOCKET NO. 2010-15-C - Complaint and Petition for Relief of BellSouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Dialtone & More, Incorporated;

DOCKET NO. 2010-16-C - Complaint and Petition for Relief of BellSouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Tennessee Telephone Service, LLC d/b/a Freedom Communications USA, LLC;

DOCKET NO. 2010-17-C - Complaint and Petition for Relief of BellSouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T South Carolina v. OneTone Telecom, Incorporated;

DOCKET NO. 2010-18-C - Complaint and Petition for Relief of BellSouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T South Carolina v. dPi Teleconnect, LLC;

-and-

DOCKET NO. 2010-19-C - Complaint and Petition for Relief of BellSouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Image Access, Incorporated d/b/a New Phone - Discuss this Matter with the Commission.

**COMMISSION ACTION:**

My motion addresses the consolidated complaints by BellSouth Telecommunications against various telecommunications service resellers for amounts allegedly owed to BellSouth in connection with certain promotions offered by BellSouth to end users. Federal law requires that former Bell System companies offer these promotions to competitive local exchange carriers (CLECs). Other federal law requires that retail services purchased for resale by CLECs be provided at the same terms and conditions, less an appropriate discount representing avoided costs by the RLEC. Under South Carolina law, that discount has been established at 14.8%.

The disputed amounts relate to three types of offers:

I. Cash Back Offers. These are rebates to the purchasing consumer that require the purchaser to remain on the BellSouth network for thirty days before the rebate check is forwarded to the customer. These rebates could be for more or less than the first month's service. BellSouth claims that the cash back promotions should be the amount provided to the BellSouth customer less the 14.8% resale discount. The CLECs argue that in order to be on the same terms and conditions as sales to BellSouth Customers, the cash back offer should not be



discounted.

This Commission finds that the rebates should be subject to the resale discount. However since the retail customer gets his rebate after keeping the service for thirty days, this Commission finds that thirty days should be the basis for calculating the rebate. If the rebate is less than the first month's charges the discount should apply to the rebate, since this has the effect of keeping that month's charges to the CLEC within the 85.2% ratio of CLEC charges to the retail rates. In the case where the rebate is greater than the first month's charges, discounting the rebate means that the BellSouth retail customer in effect gets a better price than the CLEC. This is definitely not what we believe the Telecommunications Act of 1996 intended. Therefore, in the special cases where the rebate exceeds the first month's cost of service, we find that the retail discount should not be applied to rebate.

II. Line Connection Charge Waivers. In this promotion, BellSouth offers a waiver of the Line Connection charge to the new customer. BellSouth claims that it is meeting the requirements of equal terms and conditions by waiving the Line Connection Charges. The CLECs argue that the same terms and condition clause requires BellSouth to rebate to them the difference between the BellSouth retail charge and the discounted charge that is being waived.

We find that federal law and regulations do not require the full retail amount of the Line Connection Charge to be credited to the reseller.

III. Word of Mouth Promotions. BellSouth also offers current customers a cash payment for referring new customers to BellSouth. BellSouth argues that these payments are sales promotion activities that are already included in the 14.8% discount and are therefore not available for resale. The CLECs argue that the payment is a reduction of price for the retail service and is subject to resale requirements.

We find that Word of Mouth Promotions are indeed a marketing expense included in the resale discount. It is also important that the payment goes to the referrer and not to the new retail customer. Therefore we find that Word of Mouth Promotions are not included in the resale obligation and are not subject to being paid to the reseller.

PRESIDING: Howard

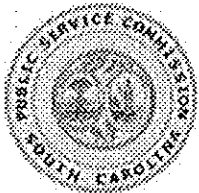
SESSION: Regular

TIME: 1:30 p.m.

	MOTION	YES	NO	OTHER
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HALL	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
HAMILTON	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
HOWARD	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
MITCHELL	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
WHITFIELD	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
WRIGHT	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	

(SEAL)

RECORDED BY: J. Schmieding



## **ATTACHMENT B**

LOUISIANA PUBLIC SERVICE COMMISSION

ORDER NO. U-31364

BELLSOUTH TELECOMMUNICATIONS, INC. D/B/A AT&T SOUTHEAST D/B/A  
AT&T LOUISIANA VERSUS IMAGE ACCESS, INC. D/B/A NEW PHONE;  
BUDGET PREPAY, INC. D/B/A BUDGET PHONE D/B/A BUDGET PHONE, INC.;  
BLC MANAGEMENT, LLC D/B/A ANGLES COMMUNICATIONS SOLUTIONS D/B/A  
MEXICALL COMMUNICATIONS;  
DPI TELECONNECT, LLC;  
AND  
TENNESSEE TELEPHONE SERVICE, INC. D/B/A FREEDOM COMMUNICATIONS  
USA, LLC

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*Docket U-31364 In re: Consolidated Proceeding to Address Certain Issues Common to  
Dockets U-31256, U-31257, U-31258, U-31259, and U-31260.*

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(Decided at the Commission's September 7, 2011)

REMAND ORDER

BellSouth Telecommunications, Inc. d/b/a AT&T Louisiana ("AT&T") filed collection actions with the Louisiana Public Service Commission ("LPSC") against Image Access, Inc. d/b/a New Phone, Budget Prepay, Inc. d/b/a Budget Phone d/b/a Budget Phone, Inc., BLC Management, LLC d/b/a/ Angles Communications Solutions d/b/a Mexicall Communications, and dPi Teleconnect, LLC (collectively "Resellers"). On May 19, 2010, the collection dockets were consolidated for the limited purpose of addressing and resolving three issues identified in the joint motion, as well as any other common issues subsequently identified and approved for consolidation. The Parties also requested that all other pending motions in the proceedings be held in abeyance while the common issues were addressed.

The Parties, as outlined in the stipulations submitted at the time of the hearing, request a ruling on three basic issues that are to be decided in this consolidated docket, which are: Cashback Offerings, the Line Connection Charge Waiver ("LCCW") and Referral Marketing ("Word-of-Mouth"). A hearing was held on the consolidated issues on November 4 and 5, 2010. A Proposed Recommendation was issued in this matter on June 22, 2011. The Resellers filed Exceptions to the Proposed Recommendation on July 12, 2011. Staff also filed exceptions on July 12, 2011. While Staff agreed with the proposed recommendation concerning the LCCW and the Word-of Mouth promotion, Staff re-urged that the proper treatment of Cash Back Offerings is that proposed by Staff in its Post-Hearing Brief. AT&T Louisiana filed its Opposition Memorandum to Exceptions of Resellers and Staff on July 25, 2011. AT&T Louisiana supported the Proposed Recommendation, requesting it be issued as the Final

Recommendation. After consideration of those filings, the administrative law judge issued a Final Recommendation on August 18, 2011 adopting AT&T's position on all three issues.

The ALJ's Recommendation was considered by the Commission at its September 7, 2011 Business and Executive Session. Following Oral Argument from Staff, Resellers, and AT&T, Commissioner Holloway made a motion to remand this matter back to the ALJ. Commissioner Boissiere made a substitute motion to accept the ALJ Recommendation, which was seconded by Commissioner Campbell. Commissioners Field, Skrmetta and Holloway objected. Therefore the motion died for a lack of majority. Commissioner Holloway then re-urged his initial motion to remand the matter back to the ALJ for further consideration of the methodology to be applied to cash back promotions, with Commissioners Field, Boissiere and Skrmetta voting yes to remand and Commissioner Campbell voting no.

IT IS THEREFORE ORDERED THAT:

1. This matter shall be remanded to the Administrative Hearings Division for further consideration of the calculation methodology to be applied to cash back promotions.
2. This Order shall be effective immediately.

**BY ORDER OF THE COMMISSION  
BATON ROUGE, LOUISIANA**

September 28, 2011

/S/ JAMES M. FIELD  
DISTRICT II  
CHAIRMAN JAMES M. FIELD

/S/ CLYDE C. HOLLOWAY  
DISTRICT IV  
VICE CHAIRMAN CLYDE C. HOLLOWAY

/S/ FOSTER L. CAMPBELL (NO)  
DISTRICT V  
COMMISSIONER FOSTER L. CAMPBELL

/S/ LAMBERT C. BOISSIERE  
DISTRICT III  
COMMISSIONER LAMBERT C. BOISSIERE, III

  
EVE KAHAO GONZALEZ  
SECRETARY

/S/ ERIC F. SKRMETTA  
DISTRICT I  
COMMISSIONER ERIC F. SKRMETTA